IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 03.04.2007

CORAM:

THE HONOURABLE MR.JUSTICE A.C.ARUMUGAPERUMAL ADITYAN

Crl.R.C.No.1497 of 2002

The Deputy Commissioner
of Income Tax,
Special Range - II,
Coimbatore. ..Revision Petitioner/Complainant

vs.

1.M/s.Engineering Industrial
Foundry Co (Firm),
Rep by Managing Partner S.Ramesh
No.19, Senguptha Street,
Coimbatore.

2.Thiru.S.Ramesh
3.Thiru.S.Sriram
4.Thiru.R.Vasudevan
5.Smt.R.Mythili
6.Thiru.S.Rajagopalan
7.Thiru.V.Ranganathan ..Respondent/accused

Prayer: This Revision has been preferred under Section 397 and 401 of Cr.P.C., against the order dated 12.06.1998 in Crl.R.P.No.136 of 1993 passed by the II Additional Sessions Judge, Coimbatore, reversing the order dated 6.10.1993 in Crl.M.P.No.2597 of 1992 in C.C.No.127 of 1991 on the file of the Chief Judicial Magistrate, Coimbatore.

For Appellant : Mr.K.Ramasamy
Special Public Prosecutor

For Respondent : Mr.V.Gopinath, Senior Counsel
for Mr.R.Johh Sathyan

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

ORDER

This revision has been preferred against the order passed in Crl.R.C.No.136/1993 on the file of the II Additional Sessions Judge, Coimbatore, against the order in Crl.M.P.No.2597 of 1992 in C.C.No.127 of 1991 on the file of the Chief Judicial Magistrate, Coimbatore. The accused in C.C.No.127 of 1991 on the file of the Chief Judicial Magistrate, Coimbatore, have filed Crl.M.P.No.2597 of 1992 under section 245 of Cr.P.C., for discharge of them from the offence alleged against them in C.C.No.127 of 1991. The learned trial judge, after going through the affidavit to the petition and also the counter filed by the respondent, has dismissed the petition. Aggrieved by the findings of the learned trial judge, the accused have preferred a criminal revision petition No.136/1993 before the II Additional Sessions Judge, Coimbatore. The learned Sessions judge, after giving due deliberations to the submissions made by the learned counsel on both sides and after going through the oral and documentary evidence let in before the trial Court, has allowed the revision thereby setting aside the order passed in Crl.M.P.No.2597 of 1992 in C.C.No.127 of 1991, resulting discharge of the accused from the criminal liability alleged against them, which necessitated the revision before this Court.

2. The only point to be decided in this revision is whether there is any prima facie case against the accused to proceed with the trial in C.C.No.127 of 1991?

3. The Point:-

3(a) The complaint was preferred by Rang No.II, Income Tax Commissioner, Coimbatore Division, against the accused under Section 276 C and 277 of the Income Tax Act and also under Section 193 and 196 of the IPC. The learned Sessions Judge has discharged the accused on two grounds. The learned Sessions Judge would state that the Income Tax Department has levied penalty for an offence contemplated under Section 276(C)(1) of the Income Tax Act for concealment of income by the accused. The learned Sessions Judge relied on the provision contemplated under Section 279(iA) of the Income Tax Act to the effect that if a penalty levied by the department is waived or reduced then he cannot be prosecuted. The power of waivering or reducing the penalty has been given to Commissioner of Income Tax under Section 273A of the Income Tax Act. The learned Special Public Prosecutor for Income Tax Cases Thiru.K.Ramsamy would focus the attention of this Court to Section 273A of the Income Tax Act and would contend that chapter XXI of the Income Tax deals with penal section and chapter XXII of the Income Tax Act deals with prosecution and both can simultaneously be initiated against an income tax evader. The learned Special Public Prosecutor would contend that the reasoning of the learned Sessions judge that since penalty has been imposed on the accused he cannot be prosecuted cannot be a sound

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

reasoning. In support of this contention the learned Special Public Prosecutor would rely on 149 ITR 696 (P.Jayappan Vs. S.K.Perumal), wherein it has been held by the Honourable Apex Court that section 279(1A) does not provide that the mere fact that there is a possibility of the Commissioner passing an order waiving or reducing the penalty imposed or imposable on the accused under Section 271(1)(c), prosecution for an offence under Section 276C or 277 shall not be instituted. For the same proposition of law the learned Special Public Prosecutor would rely on 206 ITR 222 (Universal Supply Corporation and others Vs. State of Rajasthan and another), wherein the extract of Honourable Supreme Court has been reproduced by the Rajasthan High Court - Jaipur Bench as follows:-

> "We do not, however, agree with the view expressed by the High Court of Calcutta in *Jyoti Prakash Miter Vs. Haramohan Chowdhury (1978) 112 ITR 384.* In that case on a complaint made against the assessee for an offence punishable under Section 277 of the Act, the Chief Metropolitan Magistrate issued process. Thereupon the assessee questioned the validity of the initiation of the criminal proceedings before the High Court of Calcutta on the ground that until the penalty proceedings initiated in respect of the same period under Section 271(1)(c) of the Act were finally disposed of, no complaint could be filed. The contention of the assesseee was that the prosecution was opposed to the principles of natural justice as he would be deprived of the benefit of a finding which was likely to be recorded in his favour in the penalty proceedings. It was urged on behalf of the Department that the penalty proceedings under Section 271(1)(c) had no direct bearing on the maintainability of a prosecution launched under Chapter XXII of the Act. This High Court took the view, which according to us in an erroneous one, that the provisions of section 279(1A) of the Act established the necessity for the completion of the penalty proceedings before the institution of the prosecution and, therefore, as long as the penalty proceedings were pending, the criminal proceedings could not be instituted."

So the first reasoning given by the learned Sessions Judge that since penalty has been levied under Ex.P.15, prosecution against the accused cannot be proceeded with is erroneous.

3(b) The next ground on which the learned Sessions Judge has allowed the revision was that one Sampath, Managing Partner of A1-partnership firm had filed the income tax return for A1-partnership firm for the assessment year 1980-1981 and according to the prosecution, the concealment of income by A1-partnership firm was to the tune of Rs.2,20,000/- and that for this lapse a penalty has been levied under Ex.P.15 and that there was no material to show that the other accused had knowledge or connivance with the said Sampath to submit a false income tax return. The learned Senior Counsel Thiru.Gopinath relying on Ex.P.15,

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

would contend that for the concealment of income to the tune of Rs.2,20,000/- alone a penalty of Rs.63,360/- was levied as per Section 271 (1)(C) of the Income Tax Act. The learned Senior Counsel would attract the attention of this Court to the evidence of P.Ws. 1 to 3, the income tax officials, deposed before the trial Court before framing of charges by the trial Court. In the chief examination P.Ws.1 and 3 would admit that A2 to A9 are the partners in A1-partnership firm and that A4 and A6 are now no more and that P.W.2 has not impleaded the accused in his evidence in respect of the concealment of Rs.2,20,000/- income. The learned senior counsel would rely on the deposition of P.W.3 in the cross-examination to the effect that Thiru.Sampath is the managing partner of A1-partnership firm and that even during his investigation Sampath was not alive, but A2 has given a statement to the effect that he is responsible for the concealment of income for the Kalinga Industries also. In this regard the learned Special Public Prosecutor would draw the attention of this Court to the complaint filed in the case wherein it has been stated that in the revised return filed on behalf of A1-partnership firm for the assessment year 1980 -1981, the concealment of income of Rs.2,20,000/- has been admitted and besides that it has also been admitted that the income from Kalinga Iron Works to the tune of Rs.66,000/- was also not disclosed. But as far as the concealment of Rs.66,000/- from out of the income from Kalinga Iron Works (twice) the evidence of P.Ws.1 to 3 are silent. But P.W.3 in his evidence in chief-examination would state that the income of Rs.66,000/- was stated in the revised return submitted by A1-partnership firm. But under Ex.P.15, order of levy of penalty, it is silent with regard to the concealment of the income of Rs.66,000/-. In this context the learned Special Public Prosecutor would rely on Ex.D.1, letter written by A2 to inspecting Assistant Commissioner of Income Tax, Assessment Range No.i, Coimbatore, wherein it has been stated that the revised return for the assessment year 1980-1981 revealing the mistake of concealment of Rs.66,000/- of income from Kalinga Iron Works and he has further stated that it was an accountancy error resulted in debit in the purchase account twice over of Rs.66,014/21 and that the said Sampath, managing partner of A1-partnership firm also expired on 17.2.1983 and that he was the person, who was looking after the day-to-day affairs of A1-partnership firm. It has further been stated in Ex.D.1 itself that the deceased Sampath was the managing partner who was the managing the business and other persons are not in the know of things. The learned senior counsel relying on 1992 LW 120 (Alfred Borg & Co., India (P) Ltd., and 13 others and M/s.Antox India (P) Ltd., 46/3, Hossargatta Road, Bangalore), wherein it has been held as follows:-

> "In catena of cases, the Apex Court has held that initiating prosecution against sleeping partners of women, when the company is the main offender, cannot be sustained unless there was basis material to show that such partners or directors were also in charge of and responsible for the conduct of the business of the company. Merely, by alleging that directors are in charge of the company, as is found in paragraph 11 of the complaint,

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

petitioners 2 to 6 cannot be prosecuted. The complainant should further show that petitioners 2 to 6 were also responsible for the day-to-day conduct of the business of the company."

The learned Special Public Prosecutor relied on 223 ITR 68 (Income tax officer Vs. Dinesh K.Shah and others), wherein a bench of this court have held that in a case against a partnership firm notice need not be sent to each and every partner. The dictum laid in the said ratio decidendi is as follows:-

"In this context, a person 'in charge' must mean a person in over all control of the day-to-day business of the company or firm or other association. Therefore, any person who at the time the offence was committed was in charge of and was responsible to the company, which includes a firm, for the conduct of the business, can be proceeded against under section 278B of the Act notwithstanding the fact that the person proceeded against may not be either the "principal officer" or the "person responsible for paying". In view of the provisions of this section, non-issuance of individual notices to any of the partners is of no consequence. It is not necessary to issue any such notice. Section 2(35) defines the expression "principal officer" only with reference to a local authority or a company or any other public body or any association of persons or any body of individuals. The Act adopts the definition of the terms "firm", "partner" and "partnership" as contained in the Indian partnership Act, 1932. Each partner is an agent of another."

But the above said dictum will not be applicable to the present facts of the case because the issue raised in this case is not that the notice was not served to each and every partner of the firm. But the point for determination is whether there is any basic material to show that these persons were also incharge and responsible for the conduct of the business of the company. Under such circumstances, there is absolutely no material on record to show that A2 to A9 (A4 and A6 died) also are incharge and responsible for the conduct of the business of the company at the relevant point of time, when Sampath alone, as a managing partner, was looking after the affairs of the company and had submitted the impugned income tax return for the assessment year 1980-1981 in which he had concealed the income of Rs.2,20,000/-. So under such circumstances, I do not find any reason to interfere with the orders of the learned first appellate judge in discharging A2 to A9 (A4 and A6 died). Admittedly A1-partnership firm is responsible for the concealment of the income of Rs.2,20,000/- for which A1 (represented by managing partner S.Ramesh) necessarily to be prosecuted. Point is answered accordingly.

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

4. In fine, the revision is partly allowed with the following modification in the order in Crl.R.P.No.136 of 1993 on the file of the II Additional Sessions Judge, Coimbatore :- The prosecution against A1 represented by managing partner S.Ramesh is to be proceeded with, in accordance with law. The trial court is directed to dispose of the matter within a period of three months from the date of receipt of copy of this order.

Sd/
Asst.Registrar
Dated : 10.04.2007

Amended as per the order of this Court
dated 07.06.2007 and made in the application
in Crl.RC.No.1497/02.

Sd/-
Asst. Registrar
Dated : 08.06.2007.

/true copy/

Sub Asst.Registrar

To,

1.The II Addl. Sessions Judge, Coimbatore

2.The Chief Judicial Magistrate, Coimbatore

3.The Deputy Commissioner of Income Tax
Special Range No.II, Coimbatore.

4.The Senior Special public Prosecutor
for Income Tax Cases.

5.The Public Prosecutor, High Court, Madras.

6. Mr.R.John Sathyan,
Advocate, No.3, Law Chambers
High Court, Madras.

+1cc to Mr.K.Ramasamy, Advocate Sr 21346

To be substituted to the order already despatched on 21.04.2007

AKR (CO)
km/12.4.

Crl.R.C.No.1497 of 2002

RVL 09.06.2007

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/